

LAW OFFICE OF

MICHAEL K. BACHRACH

224 WEST 30TH STREET, SUITE 302
NEW YORK, N.Y. 10001

TEL. (212) 929-0592 • FAX. (866) 328-1630

MICHAEL K. BACHRACH *
* admitted in N.Y., MN and D.C.

<http://www.mbachlaw.com>
michael@mbachlaw.com

October 5, 2020

By ECF

The Hon. Analisa Torres
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

***Re: United States v. Mustafa Kamel Mustafa,
04 Cr. 356 (AT)***

Dear Judge Torres:

Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, I represent Defendant Mustafa Kamel Mustafa (a/k/a Mostafa Kamel Mostafa) in relation to various matters before this Court and before the Second Circuit Court of Appeals. At the request of Mr. Mostafa, a moment ago I filed Mr. Mostafa's pro se Motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 (hereinafter, "2255 Motion"). I write now to request that this Court stay Mr. Mostafa's 2255 proceedings and hold in abeyance any briefing in support of, or in opposition to, his 2255 Motion until such time as the appeal of the denial of his pro se Rule 33 motion has become final.

By way of relevant background, Mr. Mostafa was convicted after a jury trial of 11-counts of terrorism-related conduct on May 19, 2014. He was sentenced by the Honorable Katherine B. Forrest on January 9, 2015, to life imprisonment, and thereafter designated to ADX Florence, in Florence, Colorado, where he continues to serve his sentence. His direct appeal was decided by the Second Circuit on October 23, 2018, vacating two counts of conviction but affirming the rest. A petition for certiorari was denied by the Supreme Court on October 7, 2019.

On April 29, 2019, during the pendency of Mr. Mostafa's direct appeal, he filed a pro se Rule 33 motion seeking a new trial. The motion was denied on July 12, 2019; a motion for reconsideration was denied on August 2, 2019. At present, Mr. Mostafa's pro se Rule 33 remains pending before the Second Circuit. The undersigned counsel's Opening Brief on Appeal (in relation to the Rule 33 appeal) is due on January 15, 2021.

Because it is unclear whether Mr. Mostafa's 2255 Motion is due one year from the denial of the direct appeal of his conviction, or one year from the denial of his Rule

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33 appeal, which itself is also a “direct appeal”, on May 28, 2020, Mr. Mostafa filed a pro se motion (Doc. No. 565) requesting that this Court set the deadline for him to file his 2255 Motion as one year after his Rule 33 motion is filed. See 28 U.S.C. §§ 2255(f)(1), 2255(f)(4). To date, this Court has not ruled on that motion.

Thus, in the abundance of caution, at my suggestion and with my assistance, a barebones pro se 2255 motion was filed today, utilizing the pro se 2255 motion form available to pro se Petitioners on the Second Circuit website. The pro se form has long been considered sufficient to satisfy the one-year filing deadline under 28 U.S.C. § 2255(f), and lists the five grounds upon which Mr. Mostafa seeks relief.

The pro se 2255 form is not intended as Mr. Mostafa’s full and complete argument in support of his motion; rather it is intended as a placeholder until such time as more thorough briefing can be completed. Because, however, certain of the issues sought to be included in Mr. Mostafa’s 2255 Motion were raised by him in his pro se Rule 33 motion, and the appeal of that motion remains pending before the Second Circuit, certain of the issues cannot be fully briefed until such time as the Rule 33 appeal is decided and becomes final.

Indeed, because of the overlapping nature of these two proceedings, coupled with the specific issues sought to be raised – which includes ineffective assistance of both trial *and* appellate counsel – it is unclear at this time whether Mr. Mostafa will need to submit a memorandum in support of his 2255 Motion pro se or whether the undersigned or one of Mr. Mostafa’s other appointed counsel will be in a better position to prepare a memorandum of law for him, or at least assist him with any pro se submission.¹

As such, in an effort to conserve judicial resources and to ensure that the same issues are not before two separate courts at the same time, the undersigned respectfully submits that a stay is appropriate in this case.

Accordingly, for all of the reasons discussed above, on behalf of pro se Petitioner Mostafa Kamel Mostafa, and upon his specific request, the undersigned respectfully requests that this Court stay his 2255 proceedings and hold in abeyance any briefing in support of, and in opposition to, his 2255 Motion until one year from when his appeal of the denial of his pro se Rule 33 Motion becomes final. See 28 U.S.C. § 2255(f).

¹ The undersigned notes that when Mr. Schmidt and I were appointed by Judge Forrest to represent Mr. Mostafa for purposes of sentencing and appeal, it was our understanding that our appointment would be extended to include the preparation of his 2255 Motion. Judge Forrest retired from the bench, however, before any application was made to formally extend our appointment. We have been intending to make such application to Your Honor, but have not yet done so because other proceedings – such as his Rule 33 appeal – have taken precedence. We also believe such application remains premature until the Rule 33 appeal becomes final.

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As always, we thank Your Honor for her time and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MBR', with a long horizontal flourish extending to the right.

Michael K. Bachrach
Attorney for Mustafa Kamel Mustafa

cc: All counsel of record (by ECF)